Lincoln Park Subacute and Rehab Center, Inc., One, and Lincoln Park Subacute and Rehab Center Inc., Two *and* District 1199J, National Union of Hospitals & Healthcare Employees, AFSCME, AFL–CIO. Cases 22–CA–22284, 22–CA–22528, 22–CA–22643, and 22–RC–11416

October 17, 2001

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On July 3, 2001, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order as modified.[4]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] In adopting the conclusions that the discharges of Baines and Aldorando were unlawful, we note the Respondent failed to demonstrate that it would have discharged these employees in the absence of their union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The record did not show, for example, that the Respondent discharged other employees for comparable conduct. With particular respect to employee Aldorando, we further note the Respondent did not argue that the three lawful warnings alone were sufficient to support the discharge, i.e., in the absence of the "other disciplinary problems," which the judge found, and we affirm, referred to lawful union activity.

In recommending that the second election be set aside based on objectionable conduct, the judge expressly referred only to the unlawful warning issued to employee Aldorando. In adopting this recommendation, we also rely on the unlawful discharges of Aldorando and fellow unit employee Baines during the critical period prior to the election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Lincoln Park Subacute and Rehabilitation Center Inc., One and Lincoln Park Subacute and Rehabilitation Center Inc., Two, Lincoln Park, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified below.

1. Delete paragraph 1(b) and reletter subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(c)

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached Appendix for that of the administrative law judge.

IT IS FURTHER ORDERED that the election held on April 19, 1998, in Case 22–RC–11416, is set aside and that this case is severed and remanded to the Regional Director for Region 22 for the purpose of conducting a new election when the Regional Director deems the circumstances permit the free choice of a bargaining representative.

DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among employees in the unit found appropriate, whenever the Regional Director for Region 22 deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of third election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). We shall also delete from the Order and Notice references to the unlawful interrogations which were the subject of our prior decision reported at 333 NLRB No. 136 (2001).

quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by District 1199J, National Union of Hospitals & Healthcare Employees, AFSCME, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of the Third Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. October 17, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discipline or discharge or otherwise discriminate against any of you because you join or support District 1199J, National Union of Hospital and Healthcare Employees, AFSME, AFL–CIO or otherwise engage in concerted activity for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer reinstatement to David Aldorando and Dorothy Baines to their former jobs or if their former jobs no longer exist, to substantially equivalent jobs and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge less any net interim earnings, plus interest.

LINCOLN PARK SUBACUTE AND REHAB CENTER

Marguerite R. Greenfield Esq., for the General Counsel
Richard M. Howard Esq. and Joseph Matza Esq., for the Respondent.

SUPPLEMENTAL DECISION

I issued the original decision in these cases on July 30, 1999, but the Board, 333 NLRB No. 136, remanded certain aspects of the Decision for further findings. In accordance with the Board's instruction and after reviewing the record and considering the briefs filed, I hereby make the following

FINDINGS AND CONCLUSIONS

In my original decision, I made mixed conclusions about the credibility of David Aldorando and Tony Pacheco. For example, I thought that it was likely that Aldorando was gilding the lily when he claimed that most of the patients, whose rooms he was assigned to clean, had refused to allow him to clean. However, I found him to be credible as to his testimony that Pacheco had interrogated him regarding his union activities. (At the same time not crediting, Pacheco's denial of this assertion.)

I have reviewed the transcript again and after considering the evidence I would conclude that Aldorando gave ample notice to Pacheco of the Union's intent to use him as an observer at the election held on April 8, 1997. In my opinion, Aldorando credibly testified that he spoke to Pacheco about a week before the election and told him that he was going to be a union observer. I also credit Aldorando's testimony that on the morning of the election, at about 6 a.m., he was asked by Pacheco why he was there so early and that he replied that Pacheco knew very well that he was going to work as an observer for the elections.

The documentary evidence is consistent with Aldorando's claim that he gave prior notice inasmuch as the Union's representative faxed, on August 6, 1997, a notice reading:[1]

The enclosed list is the names of election observers representing District 1199J. Please be advised that they are to be released of their duties for the time period of the election.

* * * * *

6:00 A.M.—9:00 A.M

Leidi Garbe Dietary/Nursing Home/1st shift
David Aldorando Househeeping/I.C.C./1st shift.

2:00 P.M.—5:00 P.M.

Zirana Durand CNA/I.C.C. /2nd shift
Ghislaine Demesier CNA/I.C.C. /2nd shift

Alternates

Rose Canedo DeSouza CNA/Nursing Home/2nd shift

On August 13, 1997, Aldorando received a warning because he allegedly failed to advise Pacheco that he was not going to be available to work on election day because he was designated as an election observer. As I have concluded above, based on the credited testimony, that Aldorando and the Union gave ample notice to the Company of the Union's intent to use Aldorando as an election observer, it is my conclusion that this warning violated Section 8(a)(1) and (3) of the Act.

Aldorando received a notice of termination dated January 11, 1998. This was signed by Colleen Wheeler and it stated:

> After a thorough investigation regarding substandard work performance issues, *in addition to other disciplinary problems*, it is the decision of the facility to terminate your employment with Lincoln Park . . . . effective January 16, 1998. (Underlining for emphasis).

Pacheco was called as a witness by the Respondent and he testified that he was involved in the decision to discharge Aldorando. He described his dissatisfaction with Aldorando's work performance, mainly asserting that on random inspections, he found that Aldorando skipped rooms to which he was assigned. The Respondent introduced into evidence three written warnings dated September 19, 1997, November 28, 1997, and January 9, 1998. All dealt with alleged failures of work performance. These warnings, written by Pacheco, were very detailed and it is plain to me that he was doing his best to document any problems that he had with his staff.

Thus, the reference in the discharge notice regarding "substandard work performance issues" is amply documented by the warnings that Pacheco had given to Aldorando on the aforesaid dates.[2] However, neither Pacheco nor anyone else, adequately explained what the phrase, "in addition to other disciplinary problems," meant. Were there particular problems which Pacheco did not document and about which he did not testify? If so what were they?[3]

Pacheco denied that the warning issued to Aldorando on August 13, 1997, had anything to do with the decision to discharge him on January 11, 1998. But this denial was given as a result of a series of leading questions and, as noted above, he never explained what the "other disciplinary problems" were.

I have concluded that the discharge notice's inclusion of the phrase, "in addition to other disciplinary problems" can only refer to the August 13, 1997 warning as the Respondent has not shown that it refers to anything else. Accordingly, I do not credit Pacheco's assertion that the August 13 warning played no role in the decision to discharge Aldorando and I reaffirm my original decision in this matter with respect to Aldorando.

In my opinion, the situation regarding Dorothy Baines is somewhat more problematical. Using the *Wright Line*[4] test it seems to me that this is an extremely close case.

Baines, a certified nurse's assistant, was a union supporter whose activities including passing out union cards and soliciting union support. At a company preelection meeting held by Peter Bremer, he asked what a union could do that the company could not do, and Baines responded that the Union gave health and dental benefits.

At the time of the event that led to her discharge (Feb. 11, 1998), there does not seem to be any evidence of union activity at the workplace. On the other hand, there had been a hearing on Objections in October 1997 where Baines had testified and a Hearing Officer's Report had issued on December 19, 1997. Also, on January 16, 1998, about a month before Baines was discharged, Aldorando was discharged for what I have concluded to be discriminatory reasons. By February 11, 1998, the parties were waiting for a Board decision as to whether the election, which the Union had won, would be set aside and rerun.[5]

There is not much dispute about the facts that occurred on February 11, 1998. Baines was working on the 3 p.m. to 11 p.m. shift and was responsible for the care and feeding of six residents. These patients, including May Keubler, were fed at around 6 p.m. and after dinner, another resident, Leo Horn, not under her direct care, insisted that Baines put him to bed. Rather than ignoring this man, Baines assisted him and then returned to her assigned patients.

When she returned to Kuebler's room, her daughter complained that Kuebler had been neglected and pointed out that some fecal material had dried. Baines pulled the curtain while stating that she could not be in two places at the same time. The daughter said she was not going to let this pass and she did, in fact, make a complaint to management. The complaint was that Baines had neglected her mother and had been rude to the daughter. At the time of the incident, Nurse Beth Bitor was present.

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[1] The GC Exh. 3, indicates on the final page, that the fax was transmitted on August 6, 1998, at 9:48 and received at 9:58.

[2] I had previously concluded that these warnings were not discriminatorily motivated.

[3] It is entirely possible that this language was simply a case of Wheeler using boilerplate and that it really didn't mean anything at all. But if that was the case, no-one testified to that effect.

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)

[5] Pursuant to an Order of the Board dated February 25, 1998, a second election was conducted on April 19, 1998.

Baines's position with respect to the incident was that she was away from Kuebler only because she was attending Leo Horn. She denies that she was absent for in inordinate period of time and the General Counsel contends that the fact that the fecal matter was partly dry could be explained by the flow of warm air around the bed. Baines also denies that she was rude to the patient's daughter. The evidence here is that Baines merely said that she couldn't be in two places at the same time and that she closed the curtain at the patient's bed.

After Kuebler's daughter made the complaint, Remy Aspril called Baines to her office and told her that this person complained that Baines had been rude and rough with her mother. Baines told Aspril that she had not been rude and that, in fact, the daughter had apologized to Baines.

Thereafter, Aspril assigned Bremer to conduct an investigation and this consisted of him interviewing the patient's daughter. He did not interview Baines or Bitor. Based on the complaint and based on Bremer's investigation, Aspril decided to discharge Baines. Aspril asserted that the February 11 incident was the *only* reason that Baines was discharged and that the decision was based on her conclusion that Baines had neglected the patient and had been rude to the patient's family. Baines was discharged on February 18, 1998.

In my prior decision, I emphasized that at the time of Baines' discharge there was no evidence of union activity. By that I meant union activity at the facility. In this respect, I was attempting to point out that the relationship between the timing of her discharge and the timing of union activity was insufficiently related so as to make it difficult to infer that her discharge was motivated either by her union activity or union activity in general. On reflection, however, it seems that the relationship between the timing of Baines' discharge and the timing of union activity was not so tenuous as there was ongoing proceedings in the representation case. That is, as of February 11, 1998, there was the reasonable possibility that the election, which the Union had won, would be set aside and a new election conducted. If the Respondent wanted to get rid of union supporters, this would not be a bad time to do so, if circumstances presented themselves in such a way as to give a colorable defense.

The facts here show that Baines was a union supporter and that the Respondent knew this to be the case. The evidence, in my opinion, also shows that the Respondent had, prior to her discharge, violated the act by issuing a warning to Aldorando because he acted as the Union's election observer on August 8, 1997, and that it discharged him in January 1998, in part, because of his activities as a union supporter. Given these conclusions, it seems to me that the General Counsel has made out a prima facie case that the discharge of Baines also violated the Act. As such, and under *Wright Line*, supra, the burden shifts to the Respondent to show that it would have discharged Baines for legitimate reasons other than her union activity.

There is no question but that on February 11, 1998, a patient's daughter made a complaint about Baines' treatment of her mother and her rudeness. But it is my conclusion that Baines carried out her duties on that date to the best of her ability and with overall good judgment. It may be that she did not get back to Kuebler's room as fast as one might normally expect, but the reason for this was that she attended the needs of another patient instead of ignoring that man. Nor do I think that the facts establish objectively that Baines was rude to the daughter although I can see how that person, given the circumstances, might have over-reacted. All Baines did was say that she couldn't be in two places at the same time, while closing the curtain so that she could attend to the patient.

Baines had been employed by the Respondent for 10 years and no previous adverse actions had ever been taken against her by the company. (It is true that some complaints were made about her, but these were investigated in the normal course, and it was concluded that such complaints were not supported by the evidence.) I also note that Baines' last job appraisal, dated March 31, 1997, was very favorable in all respects.

Based on the evidence as a whole, it therefore is my present opinion that the General Counsel has established a prima facie case and that the Respondent has not met its burden of proof with respect to Baines.

OBJECTIONS TO THE ELECTION

Having reaffirmed my earlier conclusion that the Respondent violated the Act by issuing the warning to Aldorando on August 19, 1997, for discriminatory reasons, I reaffirm my recommendation that the objections be sustained and that the second election be set aside and a new election held.

AMENDED CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, the Respondent has violated Section 8(a)(1) of the Act.

2. By warning and discharging David Aldorando because of his activities on behalf of District 1199J, National Union of Hospital and Healthcare Employees, AFSME, AFL–CIO, the Respondent has violated Section 8(a)(1) & (3) of the Act.

3. By discharging Dorothy Baines because of her activities on behalf of the Union, the Respondent has violated Section 8(a)(1) & (3) of the Act.

4. The unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner alleged in the complaint.

6. The Union's objections are sustained.

7. The conduct found to be objectionable are sufficiently serious to set aside the election and to hold a new one.[6]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined and discharged David Aldorando, and Dorothy Baines, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of their discharges to the dates of their reinstatement or valid reinstatement offers, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus

[6]See *Playskool Mfg. Co.*, 140 NLRB 1417, 1419; *Dal-Tex Optical Co. Inc.*, 137 NLRB 1782, 1786–1787 (1962).

interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Lincoln Park Subacute and Rehab Center Inc, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or discharging employees because of their membership in or activities on behalf of District 1199J, National Union of Hospital and Healthcare Employees, AFSME, AFL–CIO.

(b) Interrogating employees about their union activities or the union activities or sympathies of other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Aldorando and Dorothy Baines, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning to Aldorando dated August 13, 1997, and to the discharge of David Aldorando and to the discharge of Dorothy Baines and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Lincoln Park, New Jersey, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 22–RC–11416 be remanded to the Regional Director and that the election held on April 19, 1998 be set aside and that a new election be scheduled.

Dated, Washington, D.C. July 3, 2001

APPENDIX

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WE WILL NOT interrogate any of our employees regarding their membership in or support for any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer reinstatement to David Aldorando and Dorothy Baines to their former jobs or if their former jobs no longer exist, to substantially equivalent jobs and we will make them whole for any loss of earnings and other benefits resulting from their discharges less any net interim earnings, plus interest.

LINCOLN PARK SUBACUTE AND REHAB CENTER

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."